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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FENIKA NATHANIEL ENOSA et al.,

Defendants and Appellants.

B214532

(Los Angeles County
Super. Ct. No. NA079523)

APPEAL from a judgment of the Superior Court of Los Angeles County, James B. Pierce, Judge. Affirmed.

Alan Mason, under appointment by the Court of Appeal, for Defendant and Appellant Fenika Nathaniel Enosa.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant Alexander Sagale.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, Joseph P. Lee, Deputy Attorney General, for Plaintiff and Respondent.

After the trial court denied their motions to suppress evidence, Fenika Nathaniel Enosa and Alexander Darnell Sagale each pleaded nolo contendere to one count of carrying a concealed firearm, and each admitted that the offense was committed for the benefit of a criminal street gang. Enosa appeals from the denial of the motion to suppress, arguing that the search violated his Fourth Amendment rights. Sagale's counsel has filed a no merit brief under *People v. Wende* (1979) 25 Cal.3d 436. We affirm as to both.

BACKGROUND

On October 1, 2008, an information charged Enosa and Sagale¹ with two counts each of carrying a concealed firearm, in violation of Penal Code section 12025, subdivision (a)(2).² Counts 3 (Enosa) and 5 (Sagale) further alleged that Enosa and Sagale were active participants in a criminal street gang. Counts 4 (Enosa) and 6 (Sagale) further alleged that the firearms and unexpended ammunition were in Enosa and Sagale's immediate possession, were readily accessible to Enosa and Sagale, and the firearms were not registered to Enosa and Sagale. The information also alleged that the offense was committed for the benefit of and in association with a criminal street gang, with the specific intent to promote the criminal conduct of gang members, in violation of section 186.22, subdivision (b)(1)(A).

Enosa and Sagale each moved under section 1538.5 to suppress the firearms seized from their persons, and the trial court denied the motions following a hearing. Enosa and Sagale then each pleaded nolo contendere to one count of carrying a concealed firearm, in violation of section 12025, subdivision (a)(2), and admitted that the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(A).

The trial court sentenced Enosa and Sagale each to an aggregate term of three years and four months in state prison (16 months for the concealed weapon charge and

¹ A third defendant is not a party to this appeal.

² Unless otherwise indicated, all further statutory references are to the Penal Code.

two years for the gang enhancement). Enosa and Sagale each was ordered to pay restitution fines and court security fees, and received custody credits. Enosa and Sagale filed timely notices of appeal.

I. ENOSA

Enosa argues that the police recovered the weapon as the result of an unconstitutional patdown search conducted without specific articulable facts to suggest that he was armed or dangerous. Enosa also argues that he was not under arrest. The government argues that the search was incident to a lawful arrest and therefore constitutional.

A. The evidence at the suppression hearing

At the suppression hearing, Officer Matthew Kennison of the Long Beach Police Department testified that at 4:00 p.m. on August 30, 2008, he and a team of officers were near 3220 Caspian Avenue in Long Beach. When the officers arrived at the address, they saw “10 to 15 male Samoan and Black subjects loitering on or about the sidewalk area in front of the residence and the driveway front yard transition area.” Officer Kennison described the scene: “Several of them were sitting on folding chairs, and several of them were standing around behind them congregated in almost like a semi-circle and there appeared to be several open cans of beers, bottles of beer and cups on the ground around them.” He did not recall whether any of the men were actually standing on the sidewalk, but they were “right up against where the sidewalk was” on the unfenced front lawn.

Officer Kennison saw Enosa “standing around the rear of a parked vehicle that was in the driveway” near where everyone was sitting. “It appeared to me that he was holding a beer can in his hand. As we approached and as I exited [the patrol car], he began to walk away from me eastbound towards the front door of the residence, simultaneously pouring out the contents of the beverage that he had.” Officer Kennison believed the can in Enosa’s hand was a Bud Lite but he really did not remember.

The officers approached the group, and Officer Matthew Whybrew and Officer Kennison’s partner Officer Lee detained Enosa near the front door of the residence,

escorting him back to the patrol cars. Officer Kennison testified that he saw Officer Christopher Valdez recover a .9mm semi-automatic pistol from Enosa's front waistband.

Officer Kennison had been to the 3220 Caspian location "multiple times," and it was "a well-known hangout for S.O.S., Sons of Samoa, criminal street gang." Officer Kennison routinely patrolled the area and had been with Officer Valdez when he had recovered a gun from another S.O.S. member in 2007.

On cross-examination, Enosa's counsel pointed out that the file showed that 13 officers were present. Officer Kennison stated that seven or eight police cars arrived simultaneously. Enosa was standing in the middle of the lawn and dropped his beer as he started toward the front door when an officer told him to stop. Two officers put handcuffs on Enosa for investigation of "drinking in public." Officer Kennison did not see anything in Enosa's waistband before he was handcuffed. Enosa's counsel asked: "And he was cuffed to be—and he was arrested for drinking in public, is that right?" Officer Kennison replied: "At that point, I believe he [was] detained while we detained the other members of the group. I wouldn't say that he was necessarily under arrest at that point." Officer Kennison agreed that Enosa "was detained in the sense that he was handcuffed."

During cross-examination by Sagale's counsel, Officer Kennison stated that the officers had no search or arrest warrants, and that some of the officers had their guns drawn before finding any guns on any of the men.

Long Beach Police Officer Valdez testified that he and his partner Officer Whybrew drove past the Caspian address and called the other officers. He confirmed that "almost all the subjects were sitting in some form of lawn chairs in a semi-circle closest to the far west of the property, almost on the sidewalk area. As we drove past we saw numerous alcoholic beverages, I believe there were some Bud Lite bottles, 40-ounce beer bottles." When the other officers arrived, they all got out of their cars simultaneously. Officer Valdez had no contact with Enosa until after he was in handcuffs. Officer Valdez wrote the police report from field interview cards filled out by the other officers, then destroyed the field interview cards. Enosa was detained for drinking.

William Alo, one of the men present at the scene, testified that he was there for a “plate sale” (food sale) at the Caspian address, and that the police got out of their cars and approached the groups with guns raised. The plate sale was to raise money for the family of Natu, a friend who was shot and killed. Alo later testified that the people at the sale had come from a funeral for someone named Matthew and the money from the sale was to raise money for the funeral.

Daniel Galvez testified that he had arrived with Alo and that half or more of the police officers had guns out. Officer Valdez was recalled and testified that he had written the report but did not “observe, chronologically” how the other officers stopped Enosa and located the loaded weapon.

Enosa’s counsel argued that there was no physical evidence that the open cans contained beer, and “I don’t think guys sitting around drinking beer is enough to justify the cops coming in and arresting them and patting them down.” Officer Valdez had written a composite report and did not confirm that Enosa was on the sidewalk or near a vehicle. Long Beach Municipal Code section 9.22.010 prohibited consuming an alcoholic beverage in a public place, and because nobody saw Enosa drink, “you can only arrest for misdemeanor in the presence, that requires drinking.” “I don’t think it [the search] would rise to the constitutional mustard [sic]. There is no evidence of a misdemeanor in the presence. . . . [¶] . . . [¶] [D]rinking is a misdemeanor and drinking means drinking. It doesn’t mean an open container. And they are not arrested for open container in public. They are arrested for drinking in public and cuffed up and patted down. . . . [¶] 15 officers probably at gunpoint and they even conceded that they are patting down all these individuals simultaneous. They didn’t justify the pat-down as being at a gang—dressed as gang members. They justified what they did for Enosa by having a beer and pouring it out, going up to the front steps. That doesn’t justify handcuffs and being detained for investigation of drinking in public, but nobody saw him drink in public. I think it’s clearly a bad arrest, and I’m asking the court to suppress the gun.” Counsel continued to argue that Enosa was not seen drinking in a public place and that the lawn was not a public place.

The prosecutor responded that the code section “specifically states no person shall transport into or drink or consume, so there are three different ways that statute can be violated. I think, at the very least, there was probable cause to believe that the statute was violated when Officer Kennison sees [Enosa] open a beer bottle, when he approaches he starts walking away and dumps the beer out. I think the crime is complete. [¶] Even if you want to talk about consuming, there is still [probable cause] to arrest for a misdemeanor.” The front lawn was a public place, “so there is no issue with the officers entering this area in order to detain and/or confiscate the weapons located on the individuals.”

The court found that the unfenced lawn was a public area. The officers legitimately drew the inference that Enosa and the others were drinking because the containers were open. Enosa was not at gunpoint, because he turned around and poured out beer. Enosa was then detained for having an open container and drinking in public. “Enosa’s gun was recovered from the waistband. That is a detention patdown for officer safety and a search incident to arrest.” The court denied Enosa’s motion to suppress. There was probable cause to pat him down and search.

B. The search was incident to a lawful arrest

In reviewing the trial court’s denial of Enosa’s motion to suppress, we “necessarily defer to [the court’s] factual findings where ‘supported by substantial evidence.’” (*People v. Samples* (1996) 48 Cal.App.4th 1197, 1203.) “However, in ‘determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.’ [Citation.]” (*Id.* at pp. 1203–1204.)

“[A] contemporaneous search without a warrant of the person arrested and of the immediately surrounding area” is justified incident to a lawful custodial arrest “because of the need ‘to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence.” (*New York v. Belton* (1981) 453 U.S. 454, 457 [101 S.Ct. 2860].) If Enosa

was lawfully arrested, the search that uncovered the weapon in his waistband was constitutional.

Long Beach Municipal Code section 9.22.010 provides “No person shall transport into or drink or consume any alcoholic beverage in any public place except upon the premises licensed under an on-sale or on-sale general license under the State Alcoholic Beverage Control Act.” Officer Kennison testified that when he got out of the patrol car, he saw Enosa pouring out the contents of a beer can as Enosa walked toward the front door. This observation gave Officer Kennison probable cause to suspect that Enosa had transported into, or drank, an alcoholic beverage in a public place.³ A police officer may arrest a person without a warrant if “[t]he officer has probable cause to believe that the person to be arrested has committed a public offense in the officer’s presence.” (§ 836, subd. (a)(1); see § 16 [“Crimes and public offenses include: . . . 2. Misdemeanors”]). “[T]here is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense.” (*People v. McKay* (2002) 27 Cal.4th 601, 607.) Officer Kennison had probable cause to arrest Enosa, and the search was lawful incident to the arrest.

Enosa argues that he was not yet under arrest after he was handcuffed, because Officer Kennison testified, “I believe he [was] detained while we detained the other members of the group. I wouldn’t say that [Enosa] was necessarily under arrest at that point.” This does not invalidate the search, however. “The fact defendant was not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest.” (*People v. Adams* (1985) 175 Cal.App.3d 855, 861; *People v. Brown* (1989) 213 Cal.App.3d 187, 192 [“It does not matter whether the officer’s search of defendant’s person preceded his formal arrest as long as he had probable cause to arrest. [Citation.] This is so even where the officer, as here, subjectively believed defendant was only being detained and was not under arrest. [Citation.]”].) Officer Kennison’s observation of

³Although Enosa argued in the trial court that the unfenced front yard was not a public place, and that only actually drinking in public would violate the municipal code, he does not repeat those arguments on appeal, and therefore waives them.

Enosa pouring out the beer provided probable cause before the search, and Enosa does not argue that his arrest at the scene was not substantially contemporaneous, even if it occurred after the search. The search was “proper as incident to the lawful arrest that ensued.” (*People v. Nieto* (1990) 219 Cal.App.3d 1275, 1278.)

Because we determine that the search was incident to a lawful arrest, we need not address Enosa’s argument that the weapon was discovered by an unconstitutional patdown search, unjustified by specific and articulable facts to support a suspicion that Enosa was armed and dangerous. (See *Terry v. Ohio* (1968) 392 U.S. 1 [88 S.Ct. 1868].)

We affirm the denial of Enosa’s motion to suppress.

II. SAGALE

A. The evidence at the suppression hearing

Long Beach Police Officer Bernardo Barajas testified that he was one of the officers who responded to 3220 Caspian Avenue on August 30, 2008. He saw Sagale standing next to the driver’s side door of a brown Cadillac parked in the driveway of the residence. Officer Barajas (who at no time drew his gun) approached Sagale and “asked him if he had anything illegal in his possession,” and Sagale responded “[t]hat he had a gun.” Officer Barajas asked him in which pocket, and Sagale told him the right front pants pocket. Officer Barajas handcuffed Sagale, searched him, and recovered the weapon from the right front pants pocket.

The trial court found that Officer Barajas had not drawn his gun and that he asked the “consensual encounter question” whether Sagale had anything illegal. The court concluded that the encounter was not a custodial interrogation or a patdown for officer safety. When Sagale stated that he had a gun that immediately gave the officer the basis to search. Further, Officer Barajas “asked further questions to avoid being overtly intrusive,” and when Sagale said ““right pocket”” that allowed Officer Barajas to search the right pocket. The court denied the suppression motion as to Sagale.

B. Wende brief

We appointed counsel to represent Sagale on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court

independently to review the record. On June 10, 2009, we advised Sagale he had 30 days within which to personally submit any contentions or issues he wished us to consider.

Sagale filed a supplemental letter brief arguing that “I have never been arrested or charged with any crimes to promote any criminal street gang, so I shouldn’t be characterized as an active gang member.” Sagale also argues that Officer Barajas lied when he testified that he had not drawn his gun, and lied when he stated that he asked Sagale if he had anything illegal before searching Sagale. Finally, Sagale argues that it was unclear whether Officer Barajas had contributed a field interview card to aid in the preparation of the police report.

1. Gang membership without arrest or charge

At the preliminary hearing, Detective Hector Gutierrez testified that Sagale had self-admitted to other police officers that he was a member of the Sons of Samoa gang, and that the gathering at the Caspian Avenue address was held after a funeral for someone killed in a drive-by shooting by a rival gang. Sagale displayed a Sons of Samoa tattoo on his stomach at the hearing. Finally, Sagale pleaded nolo contendere to the felony of carrying a concealed weapon and to the gang allegation. Sagale therefore has forfeited any challenge to the sufficiency of the evidence on the gang allegation.

2. Officer Barajas’s testimony

The trial court believed Officer Barajas’s testimony that he had not drawn his gun and that he asked Sagale if he had anything illegal, and where the gun was, before Officer Barajas took the gun from Sagale’s pocket. The trial court saw and heard the witnesses’ testimony, and when the trial court credits a particular version of events, “we necessarily defer to those factual findings where ‘supported by substantial evidence.’” (*People v. Samples, supra*, 48 Cal.App.4th at p. 1203.) In reviewing factual findings for substantial evidence, we presume in their support the existence of every fact the trial court could reasonably deduce from the evidence, and we must affirm if the circumstances reasonably justify the findings even if the evidence also supports a contrary conclusion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

At the suppression hearing, Alo testified that a female officer was pointing a gun at Sagale while Officer Barajas searched Sagale. This is not inconsistent with the testimony that Officer Barajas had not drawn his gun. Alo also testified that Officer Barajas began to search Sagale before Sagale told him that he had a gun. While this is in conflict with Officer Barajas's testimony, the officer's testimony, credited by the trial court, is substantial evidence to support the trial court's conclusion that Officer Barajas did not draw his gun and asked whether Sagale had anything illegal before searching Sagale.

3. Field interview card

Officer Valdez testified that "each individual officer" filled out field interview cards which Officer Valdez used to write the police report, before destroying the cards. Officer Barajas testified that he did not author a "police officer report," although Officer Valdez did. His statement that he did not write his own police report is not inconsistent with Officer Valdez's statement that each officer filled out field interview cards.

We have also examined the entire record and are satisfied that appellant's counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.